STATE OF WISCONSIN

IN SUPREME COURT

No. 2018AP942-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Petitioner,

v.

ROBERT DARIS SPENCER,

Defendant-Appellant-Petitioner.

COMBINED RESPONSE AND PETITION FOR CROSS-REVIEW

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ISSUES PRESENTED IN PETITION FOR REVIEW

1. After the close of evidence but before deliberations began, the circuit court questioned a sick juror in chambers, outside the presence of counsel. The court then conferred with counsel for both sides. Everyone agreed to wait for a while. Defense counsel also posed a question for the juror, which the court relayed. Upon being satisfied that the juror was sick, the court excused her for cause.

If Defendant-Appellant-Petitioner Robert Daris Spencer's right to counsel was denied at a critical stage, was that error harmless?

The circuit court answered, "yes."

The court of appeals answered, "yes."

2. Did the circuit court's decision dismissing the sick juror violate Spencer's rights to due process and equal protection, or constitute an erroneous exercise of discretion?

The circuit court did not address these issues because Spencer raised them for the first time on appeal.

The court of appeals held that Spencer forfeited these arguments.

INTRODUCTION

Plaintiff-Respondent State of Wisconsin opposes Spencer's petition for review. Spencer's petition does not present "special and important reasons" warranting this Court's discretionary review. Wis. Stat. § (Rule) 809.62(1r).

Spencer argues that review is warranted to answer the question of whether harmless-error analysis applies to the alleged denial of his right to counsel at a critical stage. As the court of appeals recognized, an answer to Spencer's question already exists. Wisconsin courts "have applied harmless error analysis to the denial of the Sixth Amendment right to

counsel when the circuit court has had ex parte communications with the jury." *State v. Anderson*, 2006 WI 77, ¶ 76, 291 Wis. 2d 673, 717 N.W.2d 74, *overruled on other grounds by State v. Alexander*, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126.

If harmless-error analysis applies, Spencer further contends that review is necessary to explain *how* that review should be conducted. But this Court has already done that. *See State v. Burton*, 112 Wis. 2d 560, 571–73, 334 N.W.2d 263 (1983), *overruled on other grounds by Alexander*, 349 Wis. 2d 327.

Finally, Spencer maintains that "by accepting [his] petition for review this [C]ourt can establish that the race of trial participants should not play a role in a court's decision whether to discharge a juror from further service." (Pet. 26–27.) Because Spencer plainly forfeited his challenges to the circuit court's remarks, this case is not the appropriate vehicle for this Court to weigh in on the matter.

STATEMENT OF THE CASE

In 2014, the State charged Spencer with felony murder and possession of a firearm by a felon. (Pet-App. A3.) Regarding the felony-murder charge, the State's theory was that Spencer attempted to rob an acquaintance, R.S., to settle a debt. (Pet-App. A3.) Spencer's accomplice, T.M., was shot and killed in the process. (Pet-App. A3.)

Spencer exercised his right to a jury trial. (Pet-App. A3.) After the close of evidence but before jury instructions, the circuit court learned that Juror 2 was sick. (R. 184:20, 24.) Juror 2 was the only black juror. (R. 184:21.) Over the course of 45 minutes, the court assessed whether Juror 2 could participate in jury deliberations. (R. 184:20–21.) It allowed her to rest in chambers. (R. 184:20.) The court asked about Juror 2's symptoms. (R. 184:20–21.) Juror 2 indicated that it

was unlikely that "she would feel well enough to proceed in any particular length of time." (R. 184:20.)

The circuit court "conferred with the attorneys." (R. 184:21.) Everyone agreed to wait for a while. (R. 184:21.) Defense counsel also requested that the court ask Juror 2 whether "her stress or her not being well enough to proceed had anything to do with her service as a juror or with the behavior of any of the other jurors." (R. 184:21–22.) Juror 2 said, "Oh, no. This has nothing to do with the trial." (R. 184:22.) The court was "satisfied with that response" and excused Juror 2 for cause. (R. 184:22–23.)

Noting that she brought a *Swain*[1] challenge before trial based on the underrepresentation of African-Americans in the jury pool, defense counsel moved for a mistrial. (R. 184:23–24.) She noted, "We're now in a situation where we have no African-American jurors." (R. 184:24.) Defense counsel also renewed her *Swain* challenge. (R. 184:25.) She further stated, "[T]he research shows . . . that even the presence of one African-American on a jury can make a difference in terms of reducing systemic bias." (R. 184:25.)

The circuit court denied defense counsel's motion "for the reasons that [it previously] stated." (R. 184:25.) It continued, "What I will say for the record is that had this fact pattern been different than what it is, that we may be having a very different discussion." (R. 184:26.) The court stated, "[T]here is not an issue here in terms of any cross-ratio [sic] identification or a crime allegedly committed by a person of one race upon the victim of another race . . . ." (R. 184:26.) It then noted "for the record" that many of the witnesses at trial

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[1] *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by Batson v. Kentucky*, 476 U.S. 79 (1986). "In *Swain*, the Court held that the systemic exclusion of African-Americans from jury arrays violated African-American defendants' rights to equal protection of the law." (Pet-App. A4 n.3.)

were black. (R. 184:26–27.) The court concluded that "if we had individuals of other races involved as witnesses in this case, we may be having a different conversation." (R. 184:27.)

Without further objection, the circuit court proceeded to instruct the remaining 12 jurors. (R. 184:27, 33.) The jury found Spencer guilty of both charges. (R. 185:5.)

The circuit court sentenced Spencer to 18 years' initial confinement and 10 years' extended supervision on the felony-murder count. (R. 137:1.) It sentenced Spencer to five years' initial confinement and five years' extended supervision on the firearm count. (R. 137:1.) The court made these sentences consecutive to each other and consecutive to Spencer's sentence in a different matter. (R. 137:2.)

Spencer filed a postconviction motion, raising two claims. First, he alleged that his trial attorney was ineffective for failing to object to inadmissible hearsay. (Pet-App. A4.) Second, he argued that the circuit court violated his right to counsel when it questioned Juror 2 about her illness outside the presence of his attorney. (Pet-App. A4.)

The postconviction court denied Spencer's motion without an evidentiary hearing. (Pet-App. A5.) Relevant here, the court held that Spencer was not denied his right to counsel at a critical stage in the proceedings. (Pet-App. A5.) Even if he was, the postconviction court ruled that the error was harmless. (Pet-App. A5.)

On appeal, Spencer renewed the above claims. (Pet-App. A5.) He also raised "three additional arguments challenging the trial court's decision to dismiss the juror for cause." (Pet-App. A5.) Specifically, he contended "that the trial court's decision to dismiss the juror for cause violated his rights to due process and equal protection and was an erroneous exercise of the trial court's discretion." (Pet-App. A6.) "As the basis for [these] argument[s], Spencer point[ed]

to the trial court's explanation of its decision in which the trial court noted that the juror and many of the trial participants were African-American." (Pet-App. A6.)

The court of appeals held that Spencer forfeited his new claims on appeal. (Pet-App. A6.) The court of appeals reasoned that the circuit court "had no chance to address" Spencer's charge that its decision to dismiss the sick juror was discriminatory. (Pet-App. A7.) The court of appeals noted that the circuit court could have "explain[ed] its reference to the race of the juror and the trial participants when it rendered its decision." (Pet-App. A7.) The circuit court also would have had the opportunity to "correct any possible error, whether of a constitutional nature or not." (Pet-App. A7.)

Regarding Spencer's right-to-counsel claim, the court of appeals assumed without deciding that Spencer was denied his right to counsel at a critical stage when the circuit court had an ex parte communication with Juror 2 about her illness. (Pet-App. A8.) Citing to *Anderson* and *Burton*, the court of appeals considered whether the assumed error was harmless. (Pet-App. A8–A11.)

In concluding that any error was harmless, the court of appeals noted that defense counsel "was still included in the process of deciding what to do in response to the juror falling ill." (Pet-App. A10.) "Indeed, the trial court asked trial counsel's question about whether the juror's illness had anything to do with the trial, and the trial court reported back with the juror's answer." (Pet-App. A10.) Further, defense counsel was involved in the decision to give the juror more time to see if she felt better. (Pet-App. A10.) Defense counsel also received the opportunity to "object[ ] to the juror's dismissal and move[ ] for a mistrial based on *Swain*." (Pet-App. A10.) Comparing this case to other cases where the circuit court "communicated with the jury outside the presence of counsel," the court of appeals determined that the

communications here were "innocuous and did not contribute to the outcome." (Pet-App. A10–11.)

Following *Burton*, the court of appeals also looked at the ex parte communications in light of Spencer's entire trial. (Pet-App. A11.) It noted that "nothing in the record" demonstrated "that the remaining twelve jurors, none of whom had any ex parte communications with the trial court, were biased or partial." (Pet-App. A11.) The court of appeals stated that "Spencer had a right to be tried by a fair and impartial jury composed of twelve members, and that is what he received despite the ill juror having been dismissed prior to deliberations." (Pet-App. A11.) Thus, the court of appeals reasoned, "the communications cannot be said to have influenced the jury's verdict." (Pet-App. A11.)

Spencer then filed a petition for review.

ARGUMENT

This Court should deny Spencer's petition because it does not meet the criteria for review.

A. The bench and bar already have guidance on (1) when a right-to-counsel violation is subject to harmless-error analysis, and (2) how that review should be conducted.

Contrary to Spencer's contention, the bench and bar do not need guidance on when a purported right-to-counsel violation is subject to harmless-error analysis, and how that analysis should be conducted.[2]

[2] The State does not concede that Spencer was denied his right to counsel at a critical stage. The parties litigated that issue at the court of appeals, but the court of appeals did not decide it. If this Court accepts Spencer's petition for review, the State intends to present that argument as an alternative basis for affirmance. *See* Wis. Stat. § (Rule) 809.62(3)(d) and (3m)(b). To avoid any

As noted, Wisconsin courts "have applied harmless error analysis to the denial of the Sixth Amendment right to counsel when the circuit court has had ex parte communications with the jury." *Anderson*, 291 Wis. 2d 673, ¶ 76. This includes ex parte communications between the court and a juror during deliberations, *id.*, ¶ 76; *State v. Koller*, 2001 WI App 253, ¶ 61, 248 Wis. 2d 259, 635 N.W.2d 838; *Burton*, 112 Wis. 2d at 565–70, as well as those conducted during voir dire, *State v. Tulley*, 2001 WI App 236, ¶ 7, 248 Wis. 2d 505, 635 N.W.2d 807. The reasoning behind applying harmless error in this context is that "situations will inevitably arise in which the communication is so innocuous that it cannot be said that the error in any way influenced the jury's verdict." *Burton*, 112 Wis. 2d at 570; *see Anderson*, 291 Wis. 2d 673, ¶ 75.

Notably, "the presumption of prejudice" that applies to complete denials of the right to counsel "is 'narrow.'" *Schmidt v. Foster*, 911 F.3d 469, 479 (7th Cir. 2018) (citation omitted). "It arises only when the denial of counsel is extreme enough to render the prosecution presumptively unreliable." *Id.* "That happens rarely: only once in the thirty-plus years since [*United States v. Cronic*, 466 U.S. 648 (1984)] has the Court applied the presumption of prejudice it described in a critical-stage case." *Id.*[3] And in that circumstance, the defendant

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possible confusion, the State respectfully requests that any order granting review make clear that the parties should address the threshold issue of whether Spencer was denied his right to counsel at a critical stage. *See In re Ambac Assur. Corp.*, 2012 WI 22, ¶ 43, 339 Wis. 2d 48, 810 N.W.2d 450 (Abrahamson, C.J., concurring); *State v. Sulla*, 2016 WI 46, ¶ 7 n.5, 369 Wis. 2d 225, 880 N.W.2d 659.

[3] A claim that the defendant was completely denied his right to counsel at a critical stage, such that prejudice is presumed, derives from *Cronic*. *See United States v. Cronic*, 466 U.S. 648, 658–59 (1984).

lacked counsel for appeal. *See id.* (citing *Penson v. Ohio*, 488 U.S. 75, 88 (1988)).

The harmless-error analysis focuses on whether there is a "reasonable possibility" that the error "contributed to the conviction." *Burton*, 112 Wis. 2d at 571 (citation omitted); *see Koller*, 248 Wis. 2d 259, ¶ 62; *Tulley*, 248 Wis. 2d 505, ¶ 7; *Anderson*, 291 Wis. 2d 673, ¶¶ 114, 117. This Court "examine[s] the circumstances and substance of the [ex parte] communication in light of the entire trial to determine whether the error was harmless." *Koller*, 248 Wis. 2d 259, ¶ 62; *see Burton*, 112 Wis. 2d at 571; *State v. Bjerkaas*, 163 Wis. 2d 949, 957–58, 472 N.W.2d 615 (Ct. App. 1991). "The burden of proof is on the beneficiary of the error to establish that the error was not prejudicial." *Tulley*, 248 Wis. 2d 505, ¶ 7.

The court of appeals' analysis here is fully consistent with the above precedent. (Pet-App. A8–11.) This is not a situation where Spencer was allegedly denied counsel for something as significant as an appeal, *see Penson*, 488 U.S. at 88, or a 17-hour overnight recess between his direct and cross-examinations, *see Geders v. United States*, 425 U.S. 80, 82–91 (1976). Nor are the circumstances analogous to a defendant who is denied his right to counsel of choice, as Spencer contends. (Pet. 11–12.)[4]

The alleged critical stage here was a narrow period after the close of evidence and before deliberations when the circuit court communicated ex parte with Juror 2 about her

[4] Spencer also relies on this Court's decision in *In Re S.M.H.* to support his position that harmless-error analysis should not apply in this case. (Pet. 10–11.) In *S.M.H.*, the circuit court terminated the defendant's parental rights without giving him a chance to present his case. *In re S.M.H.*, 2019 WI 14, ¶ 1, 385 Wis. 2d 418, 922 N.W.2d 807. Nothing close to that happened here.

illness. It is significant to note that this alleged critical stage simply involved information gathering, not the substantive determination to excuse Juror 2 for cause. *Cf. Tulley*, 248 Wis. 2d 505, ¶ 8. Specifically, the court discerned the details of Juror 2's illness and asked her "if she thought she would feel well enough to proceed in any particular length of time." (Pet-App. A9.) On these facts, the court of appeals correctly concluded that any denial of the right to counsel was not "extreme enough to render the prosecution presumptively unreliable." *Schmidt*, 911 F.3d at 479.

Contrary to Spencer's contention, the effect of the assumed error here is quantifiable. (Pet. 11–14.) The question is whether there is a "reasonable possibility" that defense counsel's absence during the investigation into Juror 2's illness contributed to Spencer's conviction. *Burton*, 112 Wis. 2d at 571 (citation omitted).

Spencer is wrong to argue that "the violation of the defendant's rights resulted in the dismissal of the only African-American juror after the close of testimony." (Pet. 13.) What could defense counsel have contributed to the discussion about the details of Juror 2's illness and her ability to proceed with deliberations that would have kept her on the jury? Spencer suggests that counsel "could have explored the possibility of an adjournment for a few hours or a day" (Pet. 12), but counsel already received that opportunity, (R. 184:20–25). Counsel also had the chance to assess the veracity of Juror 2's claimed illness. (R. 184:21–22.) Thus, it is difficult to imagine what defense counsel could have done during the alleged critical stage that she could not later do once the court conferred with the parties about the situation. It follows that the ex parte communications at issue were innocuous. (Pet-App. A11.)

Moreover, as the court of appeals noted, "nothing in the record" shows that the 12 jurors who found Spencer guilty

were "biased or partial." (Pet-App. A11.) Like Juror 2, the remaining jurors were selected following voir dire, which "plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored." *State v. Gribble*, 2001 WI App 227, ¶ 12, 248 Wis. 2d 409, 636 N.W.2d 488. There being no indication that Spencer had anything but fair and impartial jurors serving on his case, there is not a "reasonable possibility" that the alleged error contributed to his conviction. *Burton*, 112 Wis. 2d at 571 (citation omitted).

In short, the court of appeals did not struggle with the question of whether any denial of Spencer's right to counsel was subject to harmless-error analysis. Nor was it confused on how to conduct that review. The court of appeals followed precedent—not non-binding decisions from other jurisdictions, as Spencer would like (Pet. 16–18)—in determining that any error here was harmless. This Court's review is not warranted.

B. This case is not the appropriate vehicle to "establish that the race of trial participants should not play a role in a court's decision whether to discharge a juror from further service." (Pet. 26–27.)

There is no dispute that Spencer argued for the first time on appeal that the circuit court's dismissal of Juror 2 for cause violated his rights to due process and equal protection and constituted an erroneous exercise of discretion. (Pet. 21.) As the court of appeals put it, Spencer "essentially assert[s] that the trial court's decision was discriminatory because it considered the juror's race and the race of the trial participants." (Pet-App. A7.) The circuit court had no opportunity to address this charge, either at the time the

court made its remarks, or through a postconviction motion.[5] Spencer asks this Court to overlook his plain forfeiture. (Pet. 21.) This Court should not, for at least two reasons.

First, this Court will not have the benefit of the circuit court's explanation for the challenged remarks. Spencer himself wonders why the court made any comment about the race of the trial participants: "It is hard to understand what the link is between the fact that the trial participants were African-American and the determination to dismiss the only African-American on the jury." (Pet. 26.) He continues, "Taking the court's statements at face value, we are left to wonder whether the juror would have been retained if the trial participants were not African-American, or whether the juror would have been retained if she were not African-American, and why any of that mattered." (Pet. 26.)

Spencer's bemusement is exactly why Wisconsin courts utilize the forfeiture doctrine. The circuit court—not this Court—is in the best position to explain why it discussed the race of trial participants in excusing Juror 2 for cause. Without the circuit court's input, both parties and this Court are left to speculate as to what it meant. Considering the nature of Spencer's ultimate charge here—that the circuit court's decision to dismiss Juror 2 was discriminatory—the circuit court should have been given an opportunity to weigh in on the issue. *See State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727 (stating that the forfeiture rule serves the important purpose of giving the circuit court a fair opportunity to address the objection).

[5] Spencer suggests that he did not know the basis for his claims until he received the circuit court's decision on his postconviction motion. (Pet. 20–21.) The comments on which Spencer bases his claims existed well before that point. (Pet. 19–20.)

There is a second reason why this Court should not overlook Spencer's forfeiture: there is a substantial sandbagging concern here because Spencer seeks automatic reversal. Specifically, at the court of appeals, Spencer argued that his constitutional claims should not be evaluated for harmless error. (Spencer's Br. 31–32.) Allowing a defendant to seek "automatic reversal" without a timely objection would "encourage[ ] gamesmanship." *State v. Pinno*, 2014 WI 74, ¶ 61, 356 Wis. 2d 106, 850 N.W.2d 207. So, the fact that Spencer seeks automatic reversal supports the conclusion that he forfeited his constitutional claims by not timely objecting at trial.

Along the lines of gamesmanship, the State also notes that Spencer should have raised his constitutional arguments through the rubric of ineffective assistance of counsel because there was no objection at trial. *See State v. Erickson*, 227 Wis. 2d 758, 766, 596 N.W.2d 749 (1999). If this Court overlooks his forfeiture and determines that his constitutional claims are subject to a harmless-error type analysis, Spencer will have successfully shifted the burden to address the harmlessness of any potential error onto the State by not following the "normal procedure" of raising his claim through the rubric of ineffective assistance of counsel. *Erickson*, 227 Wis. 2d at 766.

For the above reasons, this case is not the appropriate vehicle to "establish that the race of trial participants should not play a role in a court's decision whether to discharge a juror from further service." (Pet. 26–27.) Review is not warranted.

TABLE OF CONTENTS

In addition to opposing Spencer's petition for review, the State petitions this Court for cross review of the court of appeals' decision partially reversing and remanding this case for a *Machner* hearing.[1] The court of appeals ruled that because Spencer sufficiently pled his ineffective-assistance claim, the circuit court was required to hold a *Machner* hearing, regardless of whether the record conclusively shows that he is not entitled to relief.

ISSUE PRESENTED IN PETITION FOR CROSS-REVIEW

It is well-established that a circuit court may deny a postconviction motion without an evidentiary hearing where the record conclusively demonstrates that the defendant is not entitled to relief.

In *State v. Sholar*, 2018 WI 53, 381 Wis. 2d 560, 912 N.W.2d 89, did this Court upend that well-established precedent as it relates to claims of ineffective assistance of counsel?

The circuit court did not address this issue.

The court of appeals implicitly answered, "yes."

STATEMENT OF CRITERIA SUPPORTING REVIEW

A decision by this Court will help develop or clarify the law and the question presented is a question of law of the type that is likely to recur unless resolved by this Court. Wis. Stat. § (Rule) 809.62(1r)(c)3.

As noted, Spencer's postconviction motion alleged that his trial counsel was ineffective for failing to object to inadmissible hearsay. The circuit court denied that claim without an evidentiary hearing, reasoning that the record

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[1] *State v. Machner*, 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979).

conclusively shows no prejudice from any deficient performance.

In partially reversing and remanding this case for a *Machner* hearing, the court of appeals did not address the basis for the circuit court's decision denying Spencer relief. Based on its conclusion that Spencer sufficently pled his ineffective-assistance claim, the court of appeals held that "the trial court was required to grant Spencer a *Machner* hearing." (Pet-App. A13.) The court of appeals cited to *Sholar* to support its remand decision. (Pet-App. A13–14.)

There once was confusion about whether a hearing is mandatory whenever a defendant sufficiently pleads his postconviction motion. *See State v. Bentley*, 201 Wis. 2d 303, 309–10, 548 N.W.2d 50 (1996) ("If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing."). But this Court has since clarified the matter: "A well-pled complaint may be denied without an evidentiary hearing if the record as a whole conclusively demonstrates that relief is not warranted." *State v. Howell*, 2007 WI 75, ¶ 77 & n.51, 301 Wis. 2d 350, 734 N.W.2d 48; *see also State v. Sulla*, 2016 WI 46, ¶¶ 29–30, 369 Wis. 2d 225, 880 N.W.2d 659.

Consistent with the above precedent, this Court in *Sholar* recognized that a "motion asserting ineffective assistance" may be denied without a hearing where the record conclusively shows that the defendant is not entitled to relief. *Sholar*, 381 Wis. 2d 560, ¶ 50. More specifically, this Court "acknowledge[d] that appellate courts frequently decide—even in the absence of a Machner hearing—that the record conclusively demonstrates a defendant was not prejudiced by alleged deficient conduct." *Id.* ¶ 54. This Court in *Sholar* took no issue with this common practice. Rather, it prohibited the *opposite* scenario. It said that "an appellate court should not

decide *prejudice exists* in an ineffective assistance claim without a Machner hearing." *Sholar*, 381 Wis. 2d 560, ¶ 54 (emphasis added).

The State pointed all this out in its motion to reconsider the court of appeals' decision granting a *Machner* hearing. By denying the State's motion and doubling down on its remand decision, the court of appeals implicitly held that a circuit court may *not* deny a sufficiently pled ineffective-assistance claim without an evidentiary hearing on record-conclusively-shows grounds.

This case is not a one-off—this Court has a petition for review pending right now on this very issue. There, like here, the court of appeals cited to this Court's decision in *Sholar* to support its remand decision. *See State v. Ruffin*, No. 2019AP1046-CR, 2021 WL 870593, ¶ 47 (Wis. Ct. App. Mar. 9, 2021) (unpublished).

The practical effect of the court of appeals' interpretation of *Sholar* is obvious: more work for postconviction courts, which serves no purpose where the record conclusively refutes the defendant's claim. Review is warranted.

SUPPLEMENTAL STATEMENT OF THE CASE

The postconviction court denied Spencer's ineffective-assistance claim without an evidentiary hearing because the record conclusively shows no prejudice from any deficient performance. (R. 163:5–6.) More specifically, the court reasoned that "there was absolute overwhelming evidence of [Spencer's] guilt," so Spencer could not show a reasonable probability of a different outcome had his counsel objected to the hearsay. (R. 163:5.)

The court of appeals recognized that this was the basis for the postconviction court's decision denying Spencer's ineffective-assistance claim. (Pet-App. A5.) It also

acknowledged the well-established legal principle that a postconviction motion may be denied without an evidentiary hearing on record-conclusively-shows grounds. (Pet-App. A12.) But the court of appeals did not evaluate whether the postconviction court erred in this regard. (Pet-App. A11–14.)

Rather, the court of appeals analyzed whether Spencer sufficiently pled his ineffective-assistance claim. (Pet-App. A11–14.) It concluded that he did. (Pet-App. A13.) In the court of appeals' view, that meant that the circuit court "was required to grant Spencer a *Machner* hearing." (Pet-App. A13.) It therefore remanded this case to the circuit court to hold a *Machner* hearing. (Pet-App. A14.)

In remanding this case for a *Machner* hearing without addressing the basis for the circuit court's decision denying Spencer relief, the court of appeals twice cited to this Court's decision in *Sholar*. It first cited to *Sholar* for the proposition that the sole issue on appeal was whether Spencer sufficiently pled his ineffective-assistance claim. (Pet-App. A13–14.) The court of appeals next cited to *Sholar* for the principle that when "an appellate court remands for a *Machner* hearing, it must leave both the deficient performance and the prejudice prongs to be addressed[.]" (Pet-App. A14.)

As noted, the State filed a motion to reconsider the court of appeals' remand decision. The court of appeals denied the motion.

The State petitions this Court for cross-review.

ARGUMENT

This Court should grant review to clarify that a postconviction motion claiming ineffective assistance may be denied without an evidentiary hearing where the record conclusively shows that the defendant is not entitled to relief.

A. A well-pled complaint may be denied without an evidentiary hearing if the record conclusively shows that the defendant is not entitled to relief.

A well-established framework exists for assessing the denial of a postconviction motion without a hearing. "A hearing on a postconviction motion is required only when the movant states sufficient material facts that, if true, would entitle the defendant to relief." *State v. Allen*, 2004 WI 106, ¶ 14, 274 Wis. 2d 568, 682 N.W.2d 433. "However, if the motion does not raise facts sufficient to entitle the movant to relief, or presents only conclusory allegations, *or if the record conclusively demonstrates that the defendant is not entitled to relief, the circuit court has the discretion* to grant or deny a hearing." *Id.* ¶ 9 (emphasis added).

As this Court knows, the above principles "have been applied to postconviction motions for many years." *Allen*, 274 Wis. 2d 568, ¶ 13. There is no exception for motions alleging ineffective assistance of counsel. *See id.* Like any other postconviction motion, a motion alleging ineffective assistance of counsel may be denied without an evidentiary hearing if the claim is insufficiently pled, *see id.* ¶¶ 13–14, or if the record conclusively shows that the defendant is not entitled to relief, *see Sholar*, 381 Wis. 2d 560, ¶ 50.

The guiding principles derive from this Court's decision in *Nelson v. State*, 54 Wis. 2d 489, 497–98, 195 N.W.2d 629 (1972). *See Bentley*, 201 Wis. 2d at 309–10. There, this Court made clear that "no hearing is required" on a postconviction

motion "where the record sufficiently refutes the allegations raised by the defendant." *Nelson*, 54 Wis. 2d at 496. In fact, this Court *instructed* circuit courts to review the record as part of their decision to grant or deny a hearing on a postconviction motion: "It is incumbent upon the trial court to form its independent judgment after *a review of the record* and pleadings and to support its decision by written opinion." *Id.* at 498 (emphasis added).

As noted, this Court's decision in *Bentley* created some confusion about whether a hearing is mandatory whenever a defendant sufficiently pleads his postconviction motion. *See Howell*, 301 Wis. 2d 350, ¶ 77 n.51. Specifically, this Court said, "If the motion on its face alleges facts which would entitle the defendant to relief, the circuit court has no discretion and must hold an evidentiary hearing." *Bentley*, 201 Wis. 2d at 309–10. "In phrasing the *Nelson* test this way, *Bentley* [could have been] interpreted to make an evidentiary hearing mandatory whenever the motion contains sufficient, nonconclusory facts, even if the record as a whole would demonstrate that the defendant's plea was constitutionally sound." *Howell*, 301 Wis. 2d 350, ¶ 77 n.51.

But in *Howell*, this Court set the record straight. It stated that "an evidentiary hearing is not mandatory if the record as a whole conclusively demonstrates that defendant is not entitled to relief, even if the motion alleges sufficient nonconclusory facts." *Howell*, 301 Wis. 2d 350, ¶ 77 n.51.

Roughly nine years later, this Court again found it necessary to instruct lower courts that a sufficiently pled postconviction motion may be denied without an evidentiary hearing on record-conclusively-shows grounds. *See Sulla*, 369 Wis. 2d 225, ¶¶ 28–30.

Yet, the court of appeals still seems to believe that an evidentiary hearing must be held on a sufficiently pled postconviction motion, at least where ineffective assistance of

counsel is concerned. (Pet-App. A13–14); *see Ruffin*, 2021 WL 870593, ¶ 47. This Court's more recent decision in *Sholar* has led to the court of appeals' current practice (in District I, at least). (Pet-App. A13–14); *see Ruffin*, 2021 WL 870593, ¶ 47.

B. This Court in *Sholar* did not upend the well-established principle that a postconviction motion may be denied without a hearing on record-conclusively-shows grounds, nor did it create a special exception for ineffective-assistance claims.

As best as the State can tell, here's the problematic language from *Sholar*: "When a circuit court summarily denies a postconviction motion alleging ineffective assistance of counsel without holding a Machner hearing, the issue for the court of appeals reviewing an ineffective assistance claim is whether the defendant's motion alleged sufficient facts entitling him to a hearing." *Sholar*, 381 Wis. 2d 560, ¶ 51. From this statement, the court of appeals has extrapolated that whenever an ineffective-assistance claim is denied without an evidentiary hearing, the sole issue is whether the motion was sufficiently pled. (Pet-App. A13–14.) In other words, whether the record conclusively refutes the defendant's claim is irrelevant. (Pet-App. A5, A13–14.)

Did this Court in *Sholar* intend for that result? The State does not believe so, for several reasons.

First, this Court in *Sholar* recognized that a "motion asserting ineffective assistance" may be denied without a hearing where the record conclusively shows that the defendant is not entitled to relief. *Sholar*, 381 Wis. 2d 560, ¶ 50. In fact, this Court acknowledged as much immediately before making the statement that apparently has caused the court of appeals some confusion. *See Sholar*, 381 Wis. 2d 560, ¶¶ 50–51.

Second, this Court in *Sholar* not only noted that courts may deny an ineffective-assistance claim without a hearing on record-conclusively-shows grounds, but it also recognized that courts "frequently" do so. *Sholar*, 381 Wis. 2d 560, ¶ 54. In particular, "appellate courts frequently decide—even in the absence of a Machner hearing—that the record conclusively demonstrates a defendant was not prejudiced by alleged deficient conduct." *Id.* ¶ 54. This Court in *Sholar* did *not* criticize this common practice. *See id.* Rather, it prohibited the opposite scenario, stating that "an appellate court should not decide *prejudice exists* in an ineffective assistance claim without a Machner hearing." *Sholar*, 381 Wis. 2d 560, ¶ 54 (emphasis added).

Third, the problematic language from *Sholar*—that when a circuit court "summarily denies a postconviction motion alleging ineffective assistance," the issue "is whether the defendant's motion alleged sufficient facts entitling him to a hearing"—seems to refer to a situation where the court denies a hearing on insufficient-pleading grounds, not on record-conclusively-shows grounds. *Sholar*, 381 Wis. 2d 560, ¶ 51. That was the scenario in *State v. Love*, 2005 WI 116, ¶¶ 2, 24, 284 Wis. 2d 111, 700 N.W.2d 62—the case that *Sholar* relies upon to support the above proposition, *see Sholar*, 381 Wis. 2d 560, ¶ 51. Insufficient pleading also appears to have been the basis for the circuit court's decision denying the defendant a hearing in *Sholar*. *See Sholar*, 381 Wis. 2d 560, ¶¶ 1 n.3, 25; *see also State v. Sholar*, No. 2014AP1945-CR, 2015 WL 3949200, ¶ 32 (Wis. Ct. App. June 30, 2015) (unpublished). Thus, it is entirely possible that the court of appeals is simply reading the subject language from *Sholar* far too broadly.

Fourth and finally, this Court in *Sholar* surely did not intend to order postconviction courts to hold pointless evidentiary hearings. If the record conclusively shows that

the defendant is not entitled to relief—perhaps because, as here, the defendant suffered no prejudice from any deficient performance—why should postconviction courts be required to take trial counsel's testimony at a *Machner* hearing? If the court of appeals' interpretation of *Sholar* is correct, circuit courts are now "powerless to deny a requested evidentiary hearing when there is a properly pleaded motion [claiming ineffective assistance], even though the circuit court has compelling evidence from the record that key allegations in the motion are not true." *Howell*, 301 Wis. 2d 350, ¶ 150 (Prosser, J., dissenting). For nearly 50 years, this Court has taken pains to lighten the loads of postconviction courts when there is no good reason to hold an evidentiary hearing on a motion. Why change course now?

CONCLUSION

For the above reasons, this Court's review is warranted.

Dated this 14th day of May 2021.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. § 809.62(4) for a petition for review produced with a proportional serif font. The length of this petition is 2,367 words.

Dated this 14th day of May 2021.

KARA L. JANSON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this petition for review, excluding the appendix, if any, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(12).

I further certify that:

This electronic petition for review is identical in content and format to the printed form of the petition for review filed as of this date.

A copy of this certificate has been served with the paper copies of this petition for review filed with the court and served on all opposing parties.

Dated this 14th day of May 2021.

KARA L. JANSON
Assistant Attorney General

Index to the Appendix
State of Wisconsin v. Robert Daris Spencer
Case No. 2018AP942-CR

APPENDIX CERTIFICATION

I hereby certify that filed with this petition for review, either as a separate document or as a part of this petition, is an appendix that complies with Wis. Stat. § 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the findings or opinion of the circuit court necessary for an understanding of the petition; and (4) portions of the record necessary for an understanding of the petition.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 14th day of May 2021.

KARA L. JANSON
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.62(4)(b)

I hereby certify that:

I have submitted an electronic copy of this appendix, which complies with the requirements of Wis. Stat. §§ (Rules) 809.62(4)(b) and 809.19(13).

I further certify that:

This electronic appendix is identical in content to the printed form of the appendix filed as of this date.

A copy of this certificate has been served with the paper copies of this appendix filed with the court and served on all opposing parties.

Dated this 14th day of May 2021.

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